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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1947

No. 732

AUGUST KLAPPROTT, *Petitioner*

vs.

UNITED STATES OF AMERICA, *Respondent*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF

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In The

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No.

August Klapprott, *Petitioner*

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United States of America, *Respondent*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

August J. Klapprott, presently confined on Ellis Island, New York Harbor, New York, respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit, decided January 12, 1948. The Third Circuit affirmed the judgment of the United States District Court for the State of New Jersey, entered February 17, 1947, finding against petitioner in his effort to set aside a default judgment of July 17, 1942, cancelling and revoking his certificate of citizenship. The majority opinion was written by Circuit Judge Herbert F. Goodrich and concurred in by Circuit Judge John J. O'Connell, *while Circuit Judge Albert Lee Stephens, of the Ninth Circuit, sitting by special designation, dissented.*

The instant cause emanated from a default judgment entered in the District Court of the United States for

the State of New Jersey, on July 17, 1942, cancelling and revoking petitioner's certificate of citizenship. The complaint served upon petitioner to cancel and revoke his citizenship had to be answered within a period of sixty (60) days, but on the fifty-second day of that period, he was taken into custody by agents of the Federal Bureau of Investigation and transferred to New York to stand trial on an indictment which alleged conspiracy to violate the Selective Service Act (R 33). The basis of the default judgment was petitioner's failure to file an answer to said complaint within the 60-day period after service, although the United States Attorney's Office in Newark should have known, that several days prior thereto petitioner had appeared before the United States Commissioner at Newark, New Jersey, and, was removed to New York City where he was held under $25,000.00 bond to stand trial in a criminal case, brought against him by the United States of America, which Government was likewise the plaintiff in the citizenship proceeding instituted against petitioner in another, distinct and separate jurisdiction.

## OPINIONS BELOW

The opinion of the District Court is set forth (R 21a) as is the opinion of the United States Circuit Court of Appeals for the Third Circuit (R 32).

## JURISDICTION

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A. 347).

## QUESTIONS PRESENTED

1. Were petitioner's constitutional rights abridged when, approximately eight days prior to the time for answering the civil complaint filed by the United States Attorney for the Northern District of New Jersey to revoke and cancel his certificate of citizenship, he had been indicted in another Federal jurisdiction, removed from New Jersey and held in New York under $25,000.00 bond which he was unable to raise to effect his release, of necessity rendering it impossible for him to appear in Court because he was detained in another jurisdiction, nevertheless the authorities in New Jersey proceeded to take a default judgment against him because of failure to answer the complaint or to appear in the District Court of the United States for the State of New Jersey?

2. Was petitioner justifiably charged with laches for failing to take steps to reopen his citizenship case while confined in jail for approximately four and one-half years under sentence and another criminal indictment?

3. Should a default judgment cancelling petitioner's citizenship have been entered without ex parte proof?

4. Were petitioner's constitutional rights violated by the failure of the Court to appoint counsel to represent him, or to investigate his case after he had been removed to another jurisdiction and held under a bond of $25,000.00?

## STATEMENT OF FACTS

This is an action instituted by petitioner during January, 1947, to set aside and vacate the judgment of the District Court of the United States for the State of New Jersey, of July 17, 1942, cancelling his certificate of citizenship. On October 14, 1942, petitioner was served with a complaint to cancel his citizenship. The action was instituted by the United States Attorney for the

District of New Jersey and filed in the United States District Court, Newark, New Jersey. At time of service of complaint, petitioner was residing in the County of Essex, State of New Jersey, where he was recuperating from an illness (R. 9a). He had been an active member of the German American Bund, and because of that past association, as well as lack of financial means, he found it extremely difficult to obtain counsel to represent him in the defense of the charges filed (R 10a). According to the complainf, Klapprott had sixty (60) days in which to file an answer or plead in some manner to the charges. Approximately eight (8) days prior to the expiration of the time to answer said complaint, he and many others were indicted by a Federal Grand Jury in New York City, New York; charged them with conspiracy to violate the "Selective Service Act", the case being entitled *United States vs. Wilbur Keegan et al.* Petitioner was promptly arrested by agents of the Federal Bureau of Investigation, certain personal effects were taken from him, and he was subsequently held under *Twenty-Five Thousand Dollars ($25,000.00) bond.* He appeared before the United States Commissioner in Newark, New Jersey. Removal was waived and petitioner was taken to New York City, which fact most certainly should have been known by the Federal authorities in Newark, New Jersey. The proceeding and arrest caused wide publicity. At the time of arrest, petitioner had on his person a letter addressed to the American Civil Liberties Union, which was taken from him by the authorities, the substance of which letter was a request for legal assistance to defend him in the denaturalization proceeding (R 16a). Since petitioner had no funds to employ counsel to defend him in the criminal case in New York City, counsel was appointed by the Court to act for him. He immediately called to

that attorney's attention the matter of the denaturalization proceeding (R 16a) and counsel agreed to look into the same, but apparently failed to do so (R 16a). The United States Attorney's Office in Newark, N. J., should have had knowledge because of wide publicity given the case, that petitioner was no longer in that jurisdiction and was held under Twenty-Five Thousand Dollars Bond in another jurisdiction yet on July 17, 1942, the District Court of the United States for the State of New Jersey (R 7a) was requested to and did enter a default judgment cancelling Klapprott's certificate of citizenship for his failure to answer the complaint within the time limit (R 7a).

Petitioner, with others, subsequently stood trial in New York City, in the case of *United States vs. Wilbur Keegan et al.*, and after a protracted trial was found guilty as charged and sentenced to serve 5 years in prison. This conviction was appealed to the United States Circuit Court of Appeals for the Second Circuit. Subsequently, in June, 1943, petitioner, while still confined and in custody, elected to begin service of the sentence of five (5) years heretofore imposed, and was accordingly transferred to the Federal Correction Institution at Milan, Michigan (R 17a), where he remained until approximately January 30, 1944. Petitioner was then removed to the District of Columbia, where he had been jointly indicted with twenty-nine (29) other defendants in the case of *United States vs. Joseph McWilliams et al.*, (R 17a), referred to as the "Sedition Case", the charge in substance being a conspiracy to undermine the morale of the United States armed forces. The trial of this case began in April, 1944. While the trial was in progress, the United States Circuit Court of Appeals, Second Circuit, on February 29, 1944, affirmed the conviction of petitioner and certain others in the case of *United States vs. Wilbur Keegan et al.*, 141 F. 2d 148. On May 15, 1944, the Supreme Court of the United States granted certiorari, and on June 11, 1945, reversed

petitioner's conviction along with the others. As a result, the five (5) year sentence heretofore imposed on Klapprott was set aside *Wilbur Keegan et al vs. U. S.*, 325 U. S. 348. However, the "Sedition Case" was in progress, and petitioner was confined in jail. After approximately 8 months of constant trial, the "Sedition Case" was halted by the untimely death of the presiding Justice, and a mis-trial declared, but petitioner remained confined in jail in the District of Columbia, where he was detained until approximately November 22, 1946, when Mr. Chief Justice Laws of the District Court of the United States for the District of Columbia dismissed the indictment against petitioner and others. For the first time in approximately four and one half years August Klapprott was removed from all indictments and stood a free man, but not for long. He was immediately apprehended by the Immigration authorities and transferred to Ellis Island, New York, for deportation because of the loss of his certificate of citizenship.

Shortly after removal to Ellis Island, petitioner retained counsel to take steps to reopen his citizenship case (R.40). A hearing on the petition was had January 28, 1947, the Government interposing a challenge to the jurisdiction of the Court. No testimony was taken, and on February 7, 1947, an opinion was filed by the District Court (R 21a), dismissing the proceeding because of petitioner's alleged laches (R 24a). On March 17, 1947, an appeal from the judgment of the District Court was noted, and the matter taken to the United States Circuit Court of Appeals for the Third Circuit. The case was heard by Judges Herbert F. Goodrich, Albert Lee Stephens and John J. O'Connell, on October 16, 1947, and decided on January 12, 1948. The judgment of the District Court was affirmed by a two to one decision (R 32), Judge Stephens dissenting (R 40), stating:

*"I dissent. I entertain serious doubt as to the legality of a decree revoking citizenship without proof being adduced in open court. I hold that, in the circumstances of this case, the default should be set aside."*

Judge O'Connell in a concurring opinion affirming the Court below, stated, however (R 39):

"* * * * * I believe that where such a judgment is not based upon the presentation of evidence ex parte, every consideration possible should be given the opening of such judgments, so that citizens may not be lightly deprived of the highest right within the power of the government to bestow."

## REASONS FOR GRANTING THE WRIT

1. Petitioner's constitutional guarantees were abridged when the United States Attorney's Office took a default judgment cancelling his citizenship on the grounds of failing to answer the complaint while the Government had petitioner confined under an excessive bail in another Federal jurisdiction, which circumstances certainly should have been well known to the United States Attorney's office in Newark, N. J.

2. A default judgment should not have been taken without due notice to petitioner, and under the circumstances he should have had 3 days' notice in compliance with Rule 55 (b) (2), Federal Rules of Civil Procedure.

3. A default judgment should not have been taken without presentation by the Government of clear and unequivocal ex parte proof to support the complaint and affidavit.

4. Petitioner was not justifiably chargeable with "laches" for failing to act, during the period of his incarceration, in an effort to set aside the default judgment; in such a case "laches" should not be applied, particularly where one has been the subject of two indictments such as confronted petitioner for approximately four and one half years which he served in several Federal jails.

5. Cases such as this, predicated on mental reservation at the time of taking the oath of allegiance to the United States, infer a charge of perjury, and in view of the seriousness and the very nature of the proceeding the matter should be considered criminal of nature, and the counsel should be appointed for indigents as provided for by the 6th Amendment of the Federal Constitution.

## PRAYER FOR WRIT

Wherefore, your petitioner prays for a writ of certiorari to be issued under the seal of this Court directed to the United States Circuit Court of Appeals for the Third Circuit, commanding that Court to certify and send to this Court a complete transcript of the record and all proceedings in the instant cause, so that this cause may be reviewed and determined by this Court, and that the judgment of the United States Circuit Court of Appeals for the Third Circuit may be reversed and that the petitioner may be granted such other and further relief as may seem proper.

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IN THE

# Supreme Court of the United States

No.

AUGUST KLAPPROTT, *Petitioner*

vs.

UNITED STATES OF AMERICA, *Respondent.*

## BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

### SUMMARY OF ARGUMENT

1. Certiorari should issue to correct the judgment of the Third Circuit Court of Appeals in a case involving an abridgment of petitioner's constitutional rights.

2. Certiorari should issue to correct the judgment of the Third Circuit Court of Appeals, based on the dissenting opinion of Judge Albert Lee Stephens and certain statements contained in the opinion of Circuit Judge John J. O'Connell.

3. Certiorari should issue to determine whether petitioner's certificate of citizenship should have been revoked by a default judgment, particularly without requiring the production of clear and unequivocal ex parte evidence.

4. Certiorari should issue to determine whether petitioner's constitutional rights were abridged when the Government of the United States, having caused petitioner to be indicted and removed to New York, should have known

that it was impossible for petitioner to appear because he was out of the jurisdiction of the District Court of the State of New Jersey and incarcerated in another jurisdiction, proceeded to take a default judgment to cancel and revoke his certificate of citizenship. The said Government of the United States, through the United States Attorney for the State of New Jersey, had sued petitioner in that jurisdiction to revoke his citizenship, and then, approximately 8 days before time to answer said complaint had expired, the Government had indicted petitioner in the jurisdiction of the State of New York and caused his removal from New Jersey to New York.

5. Certiorari should issue to determine whether a suit to cancel and revoke a certificate of citizenship, predicated on mental reservation at the time of taking an oath of allegiance to the United States of America, is in fact a civil or criminal proceeding, and, if criminal, whether counsel should not have been appointed for petitioner as provided by the *Sixth Amendment of the Federal Constitution.**

6. Certiorari should issue to determine whether petitioner can justifiably be charged with laches for failing to take steps to vacate the default judgment cancelling his citizenship, considering the facts, that his citizenship was cancelled by default judgment while in jail; that he was confined for a period of four and one half years thereafter, convicted in one case which was subsequently reversed, and indicted in another case which was subsequently dismissed.

## ARGUMENT

August Klapprott was admitted to citizenship in the United States of America on November 16, 1933 (App. 2a) at which time he took the oath of allegiance required for

* All emphasis supplied.

naturalization. *From the date of arrival in America after leaving Germany, the land of his birth, he has not returned to that country* (App. 13a). He was a resident of the State of New Jersey and became associated with the German-American Bund. On November 17, 1936, Klapprott married an American citizen, and one child was born of said marriage (App. 18a). The Complaint filed against petitioner by the United States Attorney for the Northern District of New Jersey to revoke and cancel his citizenship (App. 2a) contained certain allegations most of which in themselves, even if conceded to be correct, would not have been sufficient to support a finding justifying cancellation of petitioner's certificate of citizenship, *had he been in a position to appear in Court to defend the charges.* The statements contained in the complaint were in the main speculative of nature. Paragraph five of said complaint (R 3a) we will quote verbatim for the sake of convenience:

> "The oath made by the defendant to the petition and of renunciation of allegiance to the German Reich was *false* and, thereby, he fraudulently, and illegally obtained an order for admission to citizenship, and the certificate of naturalization (No. 370-7549), which was received by the defendant on November 16, 1933, should be revoked and cancelled for the following reasons:
>
> "At the time the defendant took the oath to the petition for naturalization and the oath of allegiance to the United States of America, and renounced his allegiance to the German Reich, the defendant well knew and realized he was not attached to the principles of the Constitution of the United States and he did not in fact intend to renounce and abjure absolutely and entirely his allegiance and fidelity to the state or sovereignty of the German Reich of which he was theretofore a subject or citizen, and further, that he would not bear true faith and allegiance to the Constitution of the United States of America against all enemies, foreign and domestic, and further that he

did not take the obligations of the oath freely and without any mental reservation or purpose of evasion."

The complaint was executed May 12, 1942, a period of over eight years after petitioner had become an American Citizen; and of necessity the foregoing allegations had to be based and predicated on the contents of paragraph (6) of said complaint, which reads as follows (R 3a):

"In particular and among other things, the plaintiff charges that contrary to the oaths prescribed by law for admission to citizenship, and received and taken by the defendant:

"The defendant is and has been notoriously and openly one of the chief leaders and active members of the German American Bund and its affiliates in and about the District of New Jersey. He has been president of the German-American Bund and director of Camp Nordland; Vice President of the A. V. Publishing Company; member of the Board of the A. V. Development Corporation; head of the Protective Citizens' League, Inc.; trustee for the Eastern Department of National Protective Trustees.

"From time to time and subsequently to 1935, the defendant has made, both in writing and in speeches, numerous statements indicating his allegiance and loyalty to the German Reich and his disregard and disrespect for the principles and institutions of the United States of America.

"The principles of the organizations referred to above are inimical to the Constitution of the United States and to the good order and happiness of the United States, and in fact were propagated and encouraged by the present enemies of the United States including persons who believe in the ideology enunciated by Adolph Hitler and the present ruling party of the German Reich."

At the outset, we feel justified in saying that before having petitioner's citizenship revoked and cancelled, the Government should have produced for the benefit of the

District Court "*clear and unequivocal proof*" to support the allegations contained in paragraphs five and six of the complaint. In the cases of *Baumgartner v. U. S.*, 322 U. S. 665; 87 L. ed. 1525; *Schneiderman* v. *U. S.*, 320 U. S. 118; 87 L. ed. 1796; *Wilbur Keegan et al.* v. *U. S.*, 325 U. S. 478, we sincerely feel that this Honorable Court has heretofore held that ~~such~~ CERTAIN specific acts as described in paragraph six of the complaint (R 7a) filed against Klapprott are not such as in themselves would justify cancellation and revocation of a certificate of citizenship. There are many United States Circuit and District Court decisions which have held likewise, and we are constrained to list various authorities in preface to argument of the points raised in this petition. The cases are as follows:

*Meyer* v. *U. S.*, 141 F. 2d 825;
*U. S.* v. *Rossler*, 144 F. 2d 463;
*U. S.* v. *Sotzek et al.*, 144 F. 2d 576;
*U. S.* v. *Hauck et al.*, 155 F. 2d 141;
*U. S.* v. *Bergman*, 144 F. 2d 34;
*U. S.* v. *Polzin*, 47 F. Supp 476;
*U. S.* v. *Hartman*, 51 F. Supp 71;
*U. S.* v. *Geise*, 56 F. Supp 1018;
*U. S.* v. *Haas et al.*, 51 F. Supp 910;
*U. S.* v. *Koerner*, 56 F. Supp 242;
*U. S.* v. *Kusche*, 56 F. Supp 237, and
*U. S.* v. *Mensing*, 56 F. Supp 253.

In the case of *United States* v. *Polzin*, 48 F. Supp 476, the Court on page 480 said:

> "However, we have no right to cancel citizenship upon mere speculation. *There must be satisfactory proof of fraud or illegality at the time citizenship was granted, because, as the statute now reads, it is only in such instances that citizenship can be taken away.*"

Just what evidence could the Government possibly have produced to the effect that on November 16, 1933, the date Klapprott took the oath of allegiance to the United States of America, he had a mental reservation and therefore perpetrated a fraud on the United States of America in

becoming a citizen of this country? We are confident that such evidence would have been totally lacking.

In the case of *U. S.* v. *Bergman*, 144 F. 2d 34, the Circuit Court in an opinion reversing the lower Court held that citizenship once granted should not be revoked except on *positive proof of fraud.* Allowance should be made for statements made in the heat of passion.

The strictness as to limitations placed upon the Government in denaturalization cases is aptly demonstrated in the case of *United States* v. *Jackson*, 55 F. Supp 517, where the court said that such a suit, though not a "criminal proceeding" is not an ordinary "*civil action*" since it involves an important adjudication of status, and, hence, the Government should be limited, as in a criminal proceeding, to matters charged in the complaint.

In the case of *United States* v. *Heymig*, 50 F. Supp 566, a denaturalization proceeding the Court on P 567 stated:

> "From these excerpts from decisions in other Federal Courts it seems clear to me that the rule not only should be, but is, that evidence of fraud must be clear and convincing to a degree that it satisfies the mind of the Court of the truth of the charges, *beyond a reasonable doubt.*"

At the time of service of the complaint, petitioner was suffering a severe illness, and had been previously hospitalized (R 9a). He was without funds (R 10a) and unable to secure counsel to defend him (R 15a). Eight days before an answer to said complaint was due, petitioner was arrested in New Jersey and afforded a hearing before the United States Commissioner, Newark, New Jersey. Being without funds to employ counsel petitioner agreed to his removal. He was held under an excessive bond of Twenty-Five Thousand Dollars ($25,000.00) in New York City, State of New York (R 16a), where he was detained in the Federal Detention Headquarters and in the Tombs Prison. Petitioner's impoverished

condition precluded raising the necessary funds to make bond in order to effect his release.

After petitioner's removal to New York, the District Court of the United States appointed counsel to represent him in the criminal proceeding, *United States* v. *Wilbur Keegan et al.*, Klapprott immediately called the matter of his denaturalization proceeding to that attorney's attention and he promised to look into the matter (R 16a) but which he apparently failed to do and the default judgment was taken (R 16a).

He was subsequently convicted, with many others, in the case of *U. S.* v. *Wilbur Keegan et al.*, sentenced to five years in prison, and subsequently sent to the Federal Correction Institution at Milan, Michigan, where he remained until approximately January 30, 1944, when he was transferred to jail in Washington, D. C., having been indicted jointly with 29 other persons in the case of *United States* v. *Jos. McWilliams et al.* In the meantime, and after the McWilliams case had begun, the United States Circuit Court for the Second Circuit affirmed the conviction in the case of *United States* v. *Wilbur Keegan et al.*, 141 F. 2d 248. The trial of the McWilliams case, referred to as the "Sedition Case", lasted approximately 8 months, when a mis-trial was declared because of the untimely death of the presiding judge. On November 22, 1946, Mr. Chief Justice Laws of the District Court of the United States for the District of Columbia dismissed the indictment in the "Sedition" case. However, petitioner, although free of all criminal charges, was not released but was remanded to jail and then transfetred to Ellis Island to await the Government's pleasure to deport him. Freed of all criminal charges, after 4½ years in jail, petitioner was finally able to begin his fight to have set aside and vacated the judgment taken by default, cancelling his citizenship.

In the opinion of the District Judge (R 24a), it is stated:

> "This action was initiated by the defendant more than four years after the entry of final judgment in the original proceedings. This undue delay is imputable entirely to his wilful and inexcusable neglect. * * *"

In the concurring opinion of the Second Circuit Court of Appeals (R 40) it is stated:

> "There being ample evidence in the record before us to justify the finding of the court below that Klapprott had been guilty of laches, I am constrained to agree with the conclusion that the order of the district court should be affirmed."

We most respectfully disagree with the opinions of the lower courts holding that petitioner under the foregoing circumstances could be justifiably charged with laches. It is urged that petitioner who had been in jail for a period of four and a half years, subjected to long and protracted trials under two criminal indictments, one of which was reversed by this Court and the other dismissed by the District Court and the dismissal sustained on appeal (*McWilliams* v. *U. S.*, 163 F. 2d 695), should not be held to normal restrictions and iron-clad rules as to a time element in his effort to regain his citizenship, which was taken by default, without proof and under extraordinary circumstances.

In the opinion of Circuit Judge John J. O'Connell (R 39), stress seems to be laid on the fact that petitioner's name was included with a group of other names in the case of *Citizens Protective League* v. *Clark*, 155 F. 2d 290, cert. denied 329 U. S. 797 (1946). At the time that case was filed, petitioner was confined, but on the face of the record appeared able to become a party to that proceeding. We sincerely urge that petitioner's apparent participation in that case, with a great number of other persons, does not indicate that he could have at that time proceeded in the instant case. Were the facts in that proceeding part of this record, we could aptly demonstrate his association in

the case. *We respectfully contend that the instant case is one that merits review by this Court*, and, so far as the question of laches is concerned, it should be treated and placed in the same category as the case of *Rene de Meerler* v. *People of the State of Michigan*, Supreme Court Law Ed Advance Opinions, Vol. 90, No. 7, P. 47, which was REVERSED, and the recent case of *Tony Marino* v. *Joseph E. Ragen*, reported in Vol. 92 No. 5 Supreme Court Law Ed Advance Opinions page 203, in which case the judgment below was vacated and the case remanded. In the Rene de Meerler case a period of approximately 15 years had elapsed before the matter was brought to this Court and in the Marino case a period of twenty-two years elapsed. Both case were reviewed and the convictions held to have been in violation of those petitioners' constitutional rights. WE URGE THAT THE KLAPPROTT CASE INVOLVES A SIMILAR ABRIDGMENT OF CONSTITUTIONAL RIGHTS IN THE INCEPTION, WHEN HIS CITIZENSHIP WAS REMOVED BY THE GOVERNMENT THROUGH MEANS OF A DEFAULT JUDGMENT IN THE JURISDICTION OF NEW JERSEY, WHEN AT THE SAME TIME THE GOVERNMENT HAD HIM CONFINED IN ANOTHER JURISDICTION, ALL OF WHICH FACTS MOST CERTAINLY SHOULD HAVE BEEN KNOWN TO THE AUTHORITIES. It is most respectfully contended that, whoever the man had been, and whatever the charge, he should have been notified of the Government's intention to take a default judgment, and transportation under guard should have been provided so that petitioner might be taken from New York State to New Jersey and afforded an opportunity to appear and contest the action taken against him.

There can be no doubt but what under proper circumstances, a judgment cancelling citizenship can be vacated and set aside, and time should not act as a barrier in justifiable cases. In a recent case of *United States* v. *Geisler*,

9 F. R. S. 60 B. 51, involving a cancellation of the defendant's certificate of citizenship, a period of almost four years had elapsed between the entry of a *consent judgment* and his application to set it aside, yet the judgment was set aside by the District Court.

A review of the rather meager record in this case, however, certainly affords a definite basis for statements contained in the opinions of Judge John J. O'Connell and Albert Lee Stephens (R 39-40), referring to default judgments in a case involving citizenship.

There can be no doubt that the delay on the part of petitioner to attempt to set aside the District Court's order of July 17, 1942 (R 7a), cancelling his certificate of citizenship, is imputable to causes beyond his control, as previously set forth, hence we submit the petition was timely. Laches is not a justifiable reason for refusing to consider a motion to set aside a judgment. Where conditions were such as to impute no negligence or neglect to the person in not moving sooner, the right to reopen should be granted. In the opinion of the District Court (R 21a) it appears that the basis of the decision was Klapprott's LACHES in applying for relief. Laches is a substantive defect, although it applies to procedural matters as well. If the court's contention was that it had no jurisdiction, then laches is not necessary to the Court's decision. If, however, laches is an important criterion, then the Court's jurisdiction is not affected and the sequitur is that, because of undue delay, the aggrieved party may not prevail. Such being the decision, can we say that confinement in Federal Prisons under strict security regulations during a war period is laches? Or is it a cause beyond this petitioner's control? Klapprott could not take any affirmative steps until the prison barriers were removed, and it was only while he was held in confinement by the Immigration authorities that he was permitted a period of parole, to rejoin his family and obtain assistance to go forward in his effort to regain his citizenship.

In the case of *Keeler Bros. v. Yellowstone Valley Nat. Bank, supra*, the learned court wrote as follows:

> "* * * Speedy termination of litigation, sometimes invoked as sufficient reason to deny the motion, is not the end, but means, to justice; and delays from defaults, generally more apparent than real, should be penalized by terms rather than by judgments that may be gratuities to plaintiffs and punishments to defendants, having nothing of the ultimate justice therein. Hence courts ought to and do lean to trials of the merits, and to vacate defaults even when only doubtful whether the inference or presumption is repelled or overcome, or, as generally put, doubtful whether the default should be opened. * * *"

Is not this the better view to follow in the administration of justice and particularly in a case involving the most priceless possession of man, his *American Citizenship?* We respectfully urge that the record amply supports the conclusion that petitioner, having been confined in jail for four and one-half years, was not responsible for his delay when one considers all facts and circumstances of his case, and he was not justifiably chargeable with laches. Particularly in a case involving loss of citizenship, *laches should be proven before being applied.*

There is no question that this petitioner suffered a deprivation of his constitutional rights. *Can it then be said, that one whose constitutional rights have been abridged is estopped from protesting such abridgment by any time element, be it one year or ten years? We are confident the answer is in the negative.*

Circuit Judge Stephens in his dissenting opinion in the instant case (R 40) stated:

> "I dissent. I entertain serious doubt as to the legality of a decree revoking citizenship without proof being adduced in open court. I hold that, in the circumstances of this case, the default should be set aside."

Circuit Judge John J. O'Connell in concurring with the opinion affirming (R 39), however, in referring to default judgments involving citizenship, stated:

> "While there can be no doubt that a default judgment may be entered in a proceeding to cancel a certificate of citizenship, I believe that where such judgment is not based upon the presentation of evidence *ex parte*, every consideration possible should be given to the opening of such judgments, so that citizens may not be lightly deprived of the highest right within the power of the government to bestow."

Reading the complaint, it is not difficult to realize just how correct and important the foregoing comments of the learned Judges are. We are accordingly constrained to quote certain excerpts from the affidavit attached to the complaint on which the default was predicated (R 5a).

> "* * * In the course of my official duty I have examined the files of the Federal Bureau of Investigation and in cooperation with the Immigration and Naturalization Service of the Department of Justice, I have received from the official files the facts concerning the naturalization proceedings of the subject, August Klapprott."

We respectfully ask, just what were the facts the affiant received? Were they such facts as to support a revocation of citizenship, and, if so, why were they not presented to the District Court, and made part of the record, at the time the default judgment was taken?

Paragraph 3 of said affidavit reads as follows (R 5a):

> "I have this day read the annexed copy of the form of complaint entitled United States of America v. August Klapprott dated May 12, 1942 to which this is attached and *the facts stated therein are true to the best of my knowledge and belief and the sources of the said facts are the official records of the files of the Federal Bureau of Investigation and the Immigration*

*and Naturalization Service of the Department of Justice.*"

There is nothing in the affidavit to the effect that the facts presented were the result of any personal investigation of affiant, but purely on information and belief, and taken from records compiled by some other person. Again we ask, what did the records disclose? Surely this is not the type of "*clear and unequivocal proof*" that should have been produced by the Government. Furthermore, paragraph four of said affidavit seems to support the conclusion that the acceptance of such facts as a basis for denaturalization was predicated on the opinion of the United States Attorney (R 6a).

> "I have been officially advised by the said Thorn Lord, Assistant United States Attorney, that in the opinion of the United States Attorney the facts presented him by me and set out in the annexed form of complaint state a good cause of action under the provisions of Section 738 of Title 8 U. S. C. A. for revocation of the naturalization of August Klapprott."

The sum and substance of the complaint and affidavit appears to be that W. Rulon Paxon, a special agent for the Federal Bureau of Investigation reviewed certain records of that Bureau and of the Bureau of Immigration and Naturalization Service, which records had been compiled by some third person or persons, that he then gave the information obtained to the Assistant United States Attorney, Thorn Lord, who in turn expressed to affiant an opinion that such facts constituted a good cause of action, sufficient to revoke petitioner's citizenship. It appears to us that the District Court Judge was the proper person to decide whether such facts were sufficient to revoke and cancel Klapprott's certificate of citizenship, and, we reiterate, the facts should have been presented at least in form of evidence ex parte even though petitioner was not present, *but most emphatically do we urge that it was the duty of the Government to have Klapprott present, to*

*contest and refute such charges and allegations as he saw fit.*

Citizenship in the United States of America is most certainly a possession that should not be taken from a person without the production of evidence of a clear and convincing character to warrant its cancellation and revocation.

In *Schneiderman v. United States, supra*, Justice Murphy speaking for the Court said at page 1800 of 87 L. ed.:

> "* * * in an action instituted under paragraph 15 for the purpose of depriving one of the precious rights of citizenship previously conferred we believe the facts and the law should be construed as far as is reasonably possible in favor of the citizen. Especially is this so when the attack is made long after the time when the certificate of citizenship was granted and the citizen has meanwhile met his obligations and has committed no act of lawlessness. It is not denied that the burden of proof is on the Government in this case. For reasons presently to be stated this burden must be met with *evidence of a clear and convincing character* that when citizenship was conferred upon petitioner in 1927 it was not done in accordance with strict legal requirements."

In *Baumgartner v. United States*, supra, Mr. Justice Frankfurter speaking for the Court said at page 1531 of 88 L. ed.:

> "* * * * New relations and new interest flow, once citizenship has been granted. All that should not be undone unless the proof is compelling that that which was granted was obtained in defiance of Congressional authority. * * * That is why denaturalization on this score calls for weighty proof, especially when the proof of a false or fraudulent oath rests predominantly not upon contemporaneous evidence but is established by later expressions of opinion. * * *."

It is respectfully called to the attention of this Court that Title 8 U. S. C. A. 738 does not confer a specific

authority to accomplish the cancellation of a certificate of citizenship by means of "default judgment". This appears to be conceded in the majority opinion of the Court below (R 33):

> "While the statute concerning denaturalization does not expressly say that a judgment may be taken by default against a person who does not appear, it does provide for substitute service * * *."

There can be no doubt but what service can be had by publication under certain restricted conditions. Title 8 U. S. C. A. 738 Par. (b) which reads as follows:

> "The party to whom was granted naturalization alleged to have been fraudulently or illegally procured shall, in any such proceedings under subsection (a) of this section have sixty days personal notice in which to make answer to the petition of the United States: *and if such naturalized person be absent from the United States or from the judicial district in which such person last had his residence, such notice shall be given by publication in the manner provided for the service of summons by publication or upon absentees by laws of the State or the place where such suit is brought.*"

Can it be unequivocally said that the foregoing section of the statute conferred upon the Government the right to proceed by default in Klapprott's case, *when the authorities certainly should have known where he was, and of his inability to be present in the jurisdiction where the default was entered?* We think not. Furthermore, we feel that August Klapprott in his helpless condition should have been served with a written notice of the government's application for default judgment at least 3 days prior to the hearing on such application, as provided for by Rule 55 (b) (2) Rules of Civil Procedure for the District Courts of the United States. We do not contend that the situation petitioner found himself in is incorporated in the foregoing rule, but we do contend that he was in a helpless condition and unable to appear in Court

in one jurisdiction because of detainment in another, the same party proceeding against him in both jurisdictions, then the benefits of the foregoing rule should be applicable and should be complied with and at least the person in charge of petitioner at his place of confinement in New York should have been notified.

It is quite difficult to arrive at a conclusion other than it was error on part of the Government to take a default judgment against Klapprott in view of the extraordinary circumstances and conditions that prevailed. If such an action was error in the inception, and petitioner's constitutional rights were violated by that action on the part of the Government, can it then be justifiably said that by charging him with "laches" for not moving sooner to set aside and vacate the default judgment during a period of confinement, involved in a turmoil of litigation, is the approach to correct the original error which was not his? We think not.

We respectfully urge, in the light of the facts herein, that a default judgment should not have been entered against petitioner, cancelling his citizenship. Since the proceeding is in the nature of a forfeiture, Klapprott should have been afforded the right to at least testify in his own behalf, but circumstances previously set forth precluded that privilege. We further urge, all circumstances and conditions considered, petitioner could not justifiably be charged with "laches" in his effort to regain his citizenship.

## CONCLUSION

In the historical development of our Courts, it has always been one of our principles that a man shall have a trial on the merits, where a fundamental right is involved. So much has this been ingrained in our law, our way of life, and our every day approach to civil liberties, that

the Courts have taken every precaution to preserve these most precious rights at all times. Petitioner has a valid and meritorious defense to this action, and can show good faith and excusable neglect if afforded an opportunity.

It is our humble opinion that August Klapprott, having been twice indicted, and during the periods of trial kept incarcerated for approximately four and one half years, was not guilty of wilful or inexcusable neglect in failing to answer the complaint within the prescribed time or during the ensuing period, nor was petitioner negligent in not proceeding expeditiously, in that conditions beyond his control prevented him from applying sooner for relief.

On the basis of the foregoing, therefore, we urge, and it is most respectfully submitted, that the writ of certiorari should issue.

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